COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

**L.A. ASSOCIATES, INC.**

v.

**TEWKSBURY BOARD OF APPEALS**

No. 03-01

DECISION

February 1, 2005

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HOUSING APPEALS COMMITTEE

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**DECISION**

## I. PROCEDURAL HISTORY

In May 2002, L.A. Associates, Inc., submitted an application to the Tewksbury Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build eight condominium units of mixed-income affordable housing at 214 South Street in Tewksbury. Exh. 1. The proposal was originally for townhouse-style buildings, though the developer modified its proposal to four duplex buildings. Tr. II, 73, 76, 80, 86. The housing is to be financed under the Massachusetts Housing Finance Agency's Housing Starts Program. After due notice and public hearings, the Board unanimously denied the permit, filing its decision with the Tewksbury Town Clerk on January 9, 2003. From this decision the developer appealed to the Housing Appeals Committee. The Committee conducted a site visit, and held four days of *de novo* evidentiary hearing, with witnesses sworn, full rights of

cross-examination, and a verbatim transcript.[1] Following the presentation of evidence, counsel submitted post-hearing briefs.

## II. FACTUAL OVERVIEW

The developer proposes to construct eight three-bedroom housing units in four duplex buildings on a site in South Tewksbury that is about eight-tenths of an acre. Tr. I, 60; II, 105; Exh. 6-A, 19. It is in an area called Oakland Park, which was subdivided around 1900 and is now for the most part fully developed. Tr. I, 17. The neighborhood is zoned for single-family homes on lots with a minimum area of one acre; duplex housing is not permitted. Exh. 15; Tr. II, 139; III, 24. Because the area was originally developed for summer cottages the early part of the twentieth century, however, streets are closely spaced and existing lots are small.[2] See Tr. II, 26-27; III, 68-69; Exh. 12-B. A number of the current homes are small cottages that have been converted for year-round use. Tr. II, 46; III, 68.

The proposed development site is a single 35,618-square-foot lot with the address of 214 South Street. South Street is a twenty-foot-wide, heavily traveled, connecting street. Tr. I, 95-96. Though the lot is only 170 feet wide, it fills the entire space between two parallel streets that intersect South Street perpendicularly—Mississippi Road and Tennessee Road. Exh. 19. The lot is about 250 feet deep. Exh. 19. The southern boundary is Mississippi

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1. The Committee issued a joint Pre-Hearing Order, agreed to by the parties. In it, the parties stipulated that the developer satisfies the three jurisdictional requirements found in 760 CMR 31.01(1). The Board also stipulated that Tewksbury has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order (Jun. 12, 2003), §§ I-2, I-3.

2. Much of the area was originally divided into tiny lots of approximately 1,600 square feet. Tr. II, 26; Exh. 22. These lots were later combined into lots of varying sizes and shapes. Exh. 12-B.

Road, which is a 300-foot-long, paved, dead-end street. Exh. 19. To the north is Tennessee Road, which is also a dead-end street, but is shorter with a gravel surface. Exh. 19. There are three existing homes that abut Mississippi Road to the south: one, which is a corner lot with a South Street address, is directly across from the site on a quarter-acre lot; the other two are at end of Mississippi Road on half-acre lots. Exh. 2, 12-B. To the west of the site on the north side of Mississippi Road is a single-family house on a quarter-acre lot. Exh. 2, 12-B. Beyond that (and also to the west of the site itself along Tennessee Road) are undeveloped wetlands. Tr. I, 25; Exh. 19, 12-B. Across Tennessee Road to the north is a small, vacant, one-tenth-acre lot and two houses on roughly half-acre lots, one at the end of Tennessee Road and the other a corner lot with a South Street address. Exh. 2, 12-B. Across South Street are two houses, one on a quarter-acre lot and one on a lot that is about one tenth of an acre. Exh. 2, 12-B. On the development site itself there is currently a brick-façade, single-family house, which the developer intends to demolish. Tr. II, 23; see Exh. 21-B, 21-C, 21-D, 21-E.

## III. ISSUES

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima *facie case* by showing that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also

see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

Both common local concerns and an unusual legal issue are raised in this case.[3] First, the Board argues that vehicular access to the proposed housing development is inadequate. Second, it suggests that the density of the development is inconsistent with the local zoning district and master plan recommendations. Third, it alleges that there is inadequate open space on the site. And finally, the Board argues that the Comprehensive Permit Law should not be used to raze an existing house. Pre-Hearing Order (Jun. 12, 2003), § II.

**A. Access for Emergency Vehicles**

The only significant local concerns related to vehicular access are roadway width and turnaround areas for emergency vehicles at the ends of the streets. The proposed development is between Tennessee Road and Mississippi Road, abutting both streets. Tennessee Road is currently a gravel road, which the developer will lengthen and pave during construction. Tr. II, 21; see Exh. 19, 21-A. Mississippi Road is a paved road 18 to 19 feet wide. Tr. II, 55; see Exh. 19, 21-ee. There is an existing, irregular "T" or "hammerhead" turnaround area at the end of Mississippi Road. Tr. II, 58.

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3. The Pre-Hearing Order also lists the adequacy of utility connections and the design of the stormwater management system as issues. These problems have apparently been resolved, as the Board chose not to brief those issues, thus waiving them. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995). In any case, the development will be connected to the municipal water and sewer systems, with an eight-inch looped water main properly separated from the sewer main. Tr. I, 74-75, 81-83, 91-92; Exh. 19. The stormwater management system has been redesigned

The developer's engineers testified that the roadways will comply in most respects with the town of Tewksbury's construction and design standards, and that where there are deviations, the design is adequate.[4] Tr. I, 31, 36, 42, 78, 89, 96, 106; II, 18, 96-97. This testimony, together with the simple roadway designs shown on Exhibit 19 (a site plan stamped by a professional engineer), is sufficient to establish the developer's *prima facie* case. We will therefore consider the concerns raised by the Board individually.

**1. Turning Area** – The developer's expert civil engineer testified that Tennessee Road will be constructed with a "hammerhead" or "T-shaped" turnaround area at the end, which will provide 12 feet of turning width in addition to the proposed 22-foot wide roadway—34 feet in total. Tr. II, 21-22, 52; see Exh. 19. This, he testified, will be adequate since it will permit fire trucks to pull forward and back in order to turn around and exit toward South Street. Tr. I, 57, 77, 96-97. The developer's expert testified that trucks will also be able to turn at the end of Mississippi Street, where a similar hammerhead turnaround already exists. Tr. I, 58, II, 22-23, 39, 58-59; see Exh. 21-dd, 19. This is sufficient to establish a *prima facie* case that the proposal complies with emergency access standards.

Town standards, however, would require an expanse of 90 or 100 feet of paved surface so that a fire truck could turn in a continuous movement. Tr. I, 106; II, 52; IV, 8. The fire chief testified that while trucks could enter the site, they would have to back out. Tr.

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and will be built to conform to the state Department of Environmental Protection's Stormwater Management Guidelines. Tr. I, 44, 85, 91.

4. The Board explicitly argues that with regard to emergency access, the developer failed to establish its *prima facie* case. Appellee's Post-Hearing Memorandum, p.p. 3-7 (filed Sep. 10, 2004). This argument is attractive on its face since the testimony of the developer's experts was organized in a way that was repetitive and somewhat confusing. But viewing that testimony as a whole, there it is clear that it was their position that the proposal as designed was consistent with generally recognized residential construction standards.

III, 45, 48, 53. The town's pumper truck is 38 feet long. Tr. III, 37. Its largest truck, a ladder truck, is so big that it appears that even if a turnaround were constructed to town specifications, it would not be able to turn around since it needs a radius of 76 feet, or a total of 152 feet, to turn. Tr. III, 44, 54.

We find that the Board has rebutted the developer's case, but only in part. There is sufficient uncertainty about the specifications of the turnaround areas that we find that some fire trucks will have to back out of Tennessee and Mississippi Roads to South Street. This does not necessarily mean that the proposed road layout is unsafe, however.

The Board does not claim that there is a danger that fire trucks will not be able to get to the site in an emergency. Tr. III, 53. Long dead-end streets can create access problems, but that is not the case here since these streets are well within the town's dead-end limitation of 1,000 feet. See Exh. 14, § 8.1.14 (Tr. I, 106). Nor has the Board presented a convincing case that the need to back out creates a safety hazard. The fire chief testified that his trucks follow the standard procedure of remaining at a fire until they have competed the work there. Tr. III, 44. That is, they would not leave the site on an emergency basis because they were called away to attend to a second fire. Thus, their ability to turn around (and, particularly, to turn around in one movement) instead of backing out of the street is essentially a matter of convenience. The fire department currently experiences that inconvenience on Mississippi Road, as it does on the many narrow, dead-end streets in the area. See Tr. III, 52. We therefore conclude that the Board has not met its burden of establishing that the concern about fire trucks backing out of these streets, which are 300 feet in length or less, is sufficient to outweigh the regional need for affordable housing.

**2. Roadway width** – The width of the roads is a minor issue. Town standards require road width of 24 feet—22 feet of traveled way plus a one-foot wide berm on each side. Tr. I, 105, II, 49, 51; Exh. 14, p. 21 (Table I). The developer proposed to construct a new roadway on Tennessee Road with a total width of 22 feet with no berm, and has also agreed to widen Mississippi Road. Tr. II, 109. The fire chief testified that the new roads will not be wide enough for one fire vehicle to pass another. See Tr. III, 45, 49. These proposed roads, however, would not only be wider than Mississippi Road as it exists, but also wider than South Street.[5] Tr. I, 95. And, the fire trucks are ten feet wide "mirror to mirror."[6] Tr. III, 37, 41. In light of these facts, the fire chief's testimony concerning trucks not being able to pass is not credible. See Tr. III, 45, 49.

Though it appears that the Board has not met its burden of proof regarding width, we need not decide the question since the developer explicitly offered to reconstruct Mississippi Road to "that width determined by the permit granting authority relative to standard widths." Tr. II, 109. We interpret that statement to apply to Tennessee Road as well, and will therefore require that both roads be constructed to a width of 24 feet, which will include a one-foot berm on each side. See Condition IV-2(b), below; Exh. 14, p. 51.

**B. Zoning and Planning**

To establish its prima *facie case* regarding the legitimate local zoning and planning concerns relating to density, scale, and open space, the developer presented testimony from a

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5. The town is currently engaged in a sewer and street-widening project on South Street, though the record does not indicate what the new width will be. Tr. IV, 73.

6. The width of the *bodies* of all vehicles that use the roads is limited by G.L. c. 90, § 19 to eight and one half feet.

registered architect. He testified that the density of the development is not out of character with the surrounding area, that the buildings will be compatible with the neighborhood, and that the amount of open space provided on site is consistent with town requirements. Tr. III, 68-74; also see Tr. II, 47. This is sufficient to establish a prima *facie case*.

We must, therefore, consider whether the Board has proven that the local concerns related to these matters outweigh the regional need for affordable housing.

**1. Master Plan** – The context for all local zoning requirements is a town's master plan, and for that reason, we will address the Tewksbury master plan briefly. Further, it is referred to in the Pre-Hearing Order, and it was mentioned a number of times during the hearing. See Pre-Hearing Order, § II-B(Board's Case)(d) (Jun. 12, 2003). Our primary concern is with the specific issues that the Board raised in its brief—density, style and scale, and open space—which will be addressed in detail below. The Board has not argued (nor could it, we believe) that there are specific provisions of the master plan that support denial of the comprehensive permit. That is, this is not a case like *Harbor Glen Assoc. v. Hingham*, No. 80-06 (Mass. Housing Appeals Committee Aug. 20, 1982), *KSM Trust v. Pembroke*, No. 91-02 (Mass. Housing Appeals Committee Nov. 18, 1991), or *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Sep. 18, 2002), in which the master plan is a central issue in the case.[7] Nevertheless, a brief review of it is useful as background.

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7. In virtually every case, the Board could point to general provisions in the master plan that housing proposed under Chapter 40B is inconsistent with. That is because the very purpose of the Comprehensive Permit Law is to permit waiver of zoning provisions enacted under the master plan. For instance, nearly every master plan sets aside large areas of the community for single-family homes on individual lots. But such provisions alone are obviously not sufficient justification for denial of any multi-family development in such areas. On the other hand, if the Board can point to very specific provisions of the master plan that raise weighty local concerns about this particular

The town of Tewksbury is legitimately concerned with what kind of development takes place in the Oakland Park area. Its master plan notes that "Tewksbury has very little vacant land that is suitable for new growth." Exh. 24, p. 5.20. In this part of South Tewksbury, the plan states several goals: to "preserve [the] existing base of small single-family and two-family homes," to protect older housing stock through rehabilitation, to discourage intensification of existing multi-family uses, and to prevent loss of open space. Exh. 24, Map 1. In conformity with these goals, it suggests preserving "the town's supply of 'informally' affordable homes" that have lower values due to their size, age, style, or condition. Exh. 24, p. 5.20.

The housing proposed here is consistent with these general statements in some ways and inconsistent in others.[8] Though an older house will be demolished on the site, it is not necessarily the case that the reference in the master plan to preserving the existing housing stock refers to demolition. Rather, it appears that it is a recommendation to "provide rehabilitation grants and loans." Exh. 24, Map 1. Similarly, while intensification of existing multi-family uses is discouraged, there is recognition that the housing stock contains two-family homes. Certainly, construction of a large apartment complex would be inconsistent with this in a general sense, but it is not obvious that this language was intended to apply to the sort of duplex housing proposed here. This is particularly true in light of references in the

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proposal, we will engage in a detailed review of the plan, as we did in *Hingham*, *Pembroke*, and *Barnstable*. As explained in those cases, we would first consider whether the plan is *bona fide*, whether it addresses affordable housing, and whether it has been implemented in the area of the proposal. In this case, the Board has not pressed an argument requiring that sort of analysis, nor would we be in a position to do so since only three pages of the current plan were admitted into evidence. See Exh. 24.

8. The concern with open space is not relevant since it is clear from map on which it appears that the reference is to identifiable areas of public open space, not to private open space on individual parcels. See Exh. 24, Map 1.

plan to preserving affordability. The housing proposed here not only will provide two formally restricted affordable housing units, but in addition, the six unrestricted, market-rate units are planned to sell for less than $250,000.[9] Exh. 18-A.

We conclude that the general provisions of the Tewksbury master plan have little applicability to the decision before us, and we therefore turn to the specific issues raised by the Board.

**2. Density** – An analysis of density of necessity begins with a comparison of the proposed development to the neighborhood around it.[10] Lot sizes in the neighborhood vary widely—from as little as 2,000 to 3,000 square feet to half an acre or more—but average approximately 10,000 square feet.[11] Tr. II, 46; III, 69-70; Exh. 12-B. Since four duplex buildings are to be built on this 35,618-square-foot site, in the most basic sense, because each building will occupy about 9,000 square feet, the density of the proposal is consistent with the general density—in terms of lot size—in the neighborhood.

Two questions remain, however. The first is the scale or bulk of the houses, which will be addressed below.

Second is the concern that roughly twice as many households will occupy the proposed site as typically live in an equivalent area in the surrounding neighborhood. Theoretically, additional cars, children playing outdoors, even laundry hanging outside to dry, could place unacceptable additional burdens on the surrounding neighborhood. No specific

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9. The median value of existing homes in the area is between $180,000 and $210,000. Rxh. 24, p. 5.10; Tr. IV, 26-29.

10. Density is to be distinguished from intensity, which concerns the burden the proposed use will put on the site itself rather than on the neighborhood. The Board has raised the question of intensity only in the context of open space, below.

evidence of such burden was introduced in this case. This may be because of the relatively small number of units proposed, and also because of the open space provided by the undevelopable forested wetland adjoining the site to the west. See Tr. I, 25; Exh. 19, 12-B.

The Board has not met its burden of proving that there is sufficient concern with regard to density to outweigh the regional need for housing.

**3. Style and Scale** – First, the Board argues that the proposed housing is inconsistent with the neighborhood in terms of style.

The developer has proposed two-story, clapboard, center-entry buildings in what would typically be described as a colonial style. Tr. II, 76; see Exh. 5. Architectural styles in the neighborhood are a hodgepodge. They include ranch houses (Exh. 21-K, 21-L, 21-M), older cottages (Exh. 21-O, 21-bb), cottages with a contemporary flavor (Exh. 21-F), contemporary houses (Exh. 21-U), split-entry colonials (Exh. 21-Z, 21-aa, 21-cc), brick and clapboard one-and-one-half-story houses (Exh. 21-G, 21-N), and two-story houses (Exh. 21-I). We agree with the developer's architect that the proposed buildings are not inconsistent in style. See Tr. III, 95, 110.

Second, the Board points out that the buildings are relatively large. They will be about 28 feet high, measured from the top of their foundations.[12] Tr. II, 112. Each will

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11. As noted in the Factual Overview, above, of the eight houses that surround the site, four are on half-acre lots, three on quarter-acre lots, and one on a small, one-tenth-acre lot.

12. This was an estimate based upon the scale of the architectural plans that had been prepared (Exhibit 5). The Tewksbury Zoning Bylaw permits 2.5 stories 35 feet high in this single-family districts. Exh. 15, p. 87 (Appendix B). For the sake of argument during much of his testimony, the developer's architect considered the buildings to be closer in height to the 35-foot maximum height permitted in single-family districts under the bylaw. See, e.g., Tr. III, 79-80. This is not unreasonable since the zoning provision is intended to limit the height of single-family houses on a one-acre lot. Clearly, even at 28 to 30 feet high, the four proposed buildings, placed on a lot slightly smaller than an acre, will appear bulkier than a taller single-family house. Our consideration, however, assumes that the houses be no greater than 30 feet high as measured from average grade at

contain two, two-story dwellings. The total floor area for each dwelling is about 1,400 square feet. Tr. II, 45. The exterior dimensions of each two-unit building is 40 feet by 36 feet with single-car garages at each end and twelve-foot-square decks to the rear. Tr. II, 122-124; Exh. 5.

Existing homes in the neighborhood are small, with interior sizes typically between 1,000 and 1,500 square feet. Tr. II, 46. Lot sizes vary widely—from as little as 2,000 to 3,000 square feet to half an acre or more—but average approximately 10,000 square feet. Tr. II, 46; III, 69-70; Exh. 12-B. The town's director of community development gave very precise testimony concerning twenty houses in the neighborhood that he examined. Tr. IV, 14. Of these, 7 were one-story tall, 6 were one-and-a-half-story Cape-Cod-style homes, 2 were split-level homes, and 5 were two-story homes. Tr. IV, 15.

The Board has certainly proved that the four buildings will be taller and larger than the typical house in the neighborhood. Tr. III, 78-96. But, it has not shown that the differences will be significant. For instance, on the one hand the architect conceded that each duplex building will be about twice as big as most houses in the neighborhood. Tr. III, 96. But he also noted that the house at 190 South Street (see Exhibit 21-N) was between 28 and 35 feet high, and he maintained his position credibly on cross-examination that the styles are not incompatible. Tr. III, 90, 95, 110. We agree with the clear inference of his testimony, which is not that these are very similar buildings that will blend into a homogenous neighborhood, but rather that, even though they are somewhat larger than is typical, they will

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the front of the buildings to the peak of the roof, and we will impose a condition to that effect. See § IV-2(c), below.

not seem out of place in a very diverse neighborhood.[13] The Board has not established that there is sufficient concern regarding style or scale of the proposed housing to outweigh the regional need for affordable housing.

**4. Open Space** - As noted above, the exterior dimensions of each two-unit building are 40 feet by 36 feet (1440 square feet). Tr. II, 122; Exh. 5. At the ends of the building are attached garages, which measure 12 feet by 22 feet (264 square feet each), and decks, which are 12 feet by 12 feet (144 square feet each).[14] Tr. II, 123-124; Exh. 5. Thus, the total footprint of each structure (including garages and decks) is 2,256 square feet or 9,024 square feet for all four buildings. The entire lot is 35,618 square feet. Tr. I, 60. By simple calculation, therefore, structures cover 25% of the lot. Also see Tr. II, 127. The record does not contain an exact figure for the area of paved surfaces, but from Exhibit 19, it appears that parking and driveways account for as much as 10 to 15% of the site.[15] We find that 60% of the site is open space.

Though the purpose of the Comprehensive Permit law is to permit waiver of unnecessarily restrictive local requirements, it is nevertheless instructive to consider the

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13. In its brief, the Board discusses our decision in *Woodridge Realty Trust v. Ipswich*, No. 00-04 (Mass. Housing Appeals Committee Jun. 28, 2001) at great length. We agree that the case is relevant, but we reach a different conclusion. In *Ipswich*, the style of houses in the neighborhood was different than it is here, but the diversity reflected was just the same. Similarly, lot sizes varied as much as they do here. We noted in *Ipswich*, each case must be decided on its own facts with reference to the particular neighborhood involved. But it is nevertheless difficult to ignore the parallel between our approval of one duplex building on a quarter-acre lot in that case and approval of four duplex buildings here on a lot of roughly one acre. In addition, the relatively intense use proposed here also conforms to the same "smart growth" principles that we described in *Ipswich*.

14. Decks appear to be defined as "structure" under the Tewksbury Zoning Bylaw. Exh. 15, p. 79.

15. The project architect testified that roughly 70% is open space, defined as area excluding structures, parking, and driveway. Tr. III, 74. The Board did not specifically present expert testimony to challenge this figure, but noted in its brief that the 70% estimate did not take driveways into consideration. We agree.

requirements in the Tewksbury Zoning Bylaw—both in single-family residential districts, where the site is located, and in multi-family districts, which the design more nearly resembles. Maximum permitted building coverage, rather than open space *per se*, is regulated in single-family residential districts, and is limited to 15% of the lot. Exh. 15, p. 87 (Appendix B). In multi-family zones, maximum building coverage is not regulated, but it is required that 60% of the site be open space. Exh. 15, p. 40, 43, §§ 7180, 7281; also see p.48, § 7450. Thus, if the zoning requirements were not waived, the proposal would satisfy the multi-family zone requirements, but fall short of the single-family zone requirements.

More important is the amount of usable space available to families who will live in this development. Unfortunately, neither party presented detailed expert or other testimony about generally accepted standards for such space nor detailed information about how this space will actually be used.[16] Despite its limited conceptual value, we will focus on the idea of "play area" that the Board presented. We accept the area calculations presented in the Board's brief, which are based on the testimony of the developer's surveyor and the project plans. See Appellee's Brief, p. 14 (filed Sep. 10, 2004). Specifically, each duplex building will have an exclusive use area for the two households living in the building. Front yards are relatively small because of the need for driveways, but rear and side yards have the following dimensions (in feet):

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| Area 1 | Rear 17 x 100 | Side 17 x 70, 17 x 70 |
| Area 2 | Rear 20 x 94 | Side 17 x 60 |

16. For example, no realistic estimate of how many children are likely to live on the site was provided. On cross-examination, the developer first testified that she did not know how many children to expect, and then conceded that it could be as many as 16. Tr. II, 131. This is of little value. Similarly, there was little elaboration on the fact that trips to parks or schools are *via* South

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| Area 3 | Rear 20 x 130 | Side 27 x 60, 50 x 55 |
| Area 4 | Rear 25 x 115 | Side 20 x 60, 30 x 60 |

Thus, by calculation, Areas 1 through 4 range from a minimum of 2,900 square feet to over 6,000 square feet. The smallest amount of "play area" available to a single household will be half of the 20-by-94-foot backyard (without a side yard) in Area 2, that is, only 940 square feet. Three households will have approximately 2,000 square feet and four households will have areas ranging from 2,500 square feet to nearly 4,000 square feet.

These raw figures show that there is usable open space available to each family, if admittedly not a large amount. But the Board has not presented us with additional evidence of any sort that would demonstrate that the space provided is inadequate.[17] It has not met its burden of establishing that there are open space concerns sufficient to outweigh the regional need for housing.

**C. Demolition of an Existing Building**

The Board's last argument is that "as a matter of policy the [Committee] should not encourage 'tear-downs' on lots with less than one acre…" lest average homeowners throughout the state be encouraged to demolish their homes to "reap a financial reward" by building affordable housing. Appellee's Brief, pp. 15-16 (filed Sep. 10, 2004). There are two flaws in this argument.

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Street, which is heavily traveled. And there was no consideration given to the positive value of the undeveloped forested wetland area adjoining the site.

17. Neither has it convinced us that any of this area will be rendered unusable because of grassy swales designed to channel storm water.

First, even if we assume that many homeowners would consider tearing down their houses, the existing procedures and precedents under the Comprehensive Permit Law provide a sufficient deterrent to prevent this from happening on a widespread basis. The threat cited by the Board, "that a single family home on a one acre lot [in the suburbs] can be razed and replaced with eight dwelling units," conjures up townhouses condominiums being built in the middle of uniform, one-acre-lot subdivisions.[18] We have never seen such a project proposed before this Committee, nor would we permit it.[19] Any multi-family proposal that does not comply with the existing zoning must undergo thorough review and must be found to meet the statutory standard of consistency with local needs, as the proposal here has been.

Second, and more important, in this case the existing house at 214 South Street can be demolished as of right.[20] Tr. II, 11. In fact, in the past, "tear-downs" in Tewksbury required a special permit, but the zoning bylaw was amended a few years ago to make it easier to demolish buildings, particularly in this area of town. Tr. III, 21, 33-34.Tr. III, 21. As a result, during the past seven years, between 20 and 30 houses in South Tewksbury have been

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18. Neither party has raised the question of whether the policy considerations are different if the lot in question conforms to existing lot-size requirements or is non-conforming, as here. We are inclined to see little distinction, but we rule only on the facts presented to us.

19. The Board introduced evidence concerning a potential comprehensive permit application on another small lot in Tewksbury where the owner was denied permission under the Zoning Bylaw and G.L. c. 40A to convert a single-family house to a two-family house. See Tr. IV, 42, 47-48; Exh. 25, 26, 27. Though any plan would have to be reviewed on its merits, it is highly unlikely that the design shown in Exhibit 27 for 12 condominium units on a half-acre lot in the center of an existing single-family neighborhood would be acceptable. An alternate concept—of four single-family houses, each on a 5,000 square-foot lot, of duplex houses, or even of a quadraplex condominium—might be acceptable. See Tr. IV, 49; Exh. 27. In fact, assuming high quality design and construction, this might be a good example of "smart growth," i.e., development intended to minimize environmental impacts.

20. It is not clear if Historic Commission approval has been sought or received or whether a waiver was requested. See Tr. III, 22. We therefore require the developer to comply with any Historic Commission requirements. See § IV-2(d), below.

demolished and replaced with new single-family homes. Tr. III, 20-21, 26-27. Several of these were in the immediate area of the proposed housing. Tr. III, 27.

Some towns have enacted bylaws to prevent or limit tear-downs. In any such case, even before considering the appropriateness of the proposed design, the local board of appeals or this Committee would have to waive that bylaw to permit the proposal to proceed. As with all other local restrictions, such a waiver would require full consideration of all the factual circumstances. This is not a waiver that we would grant lightly.

In some communities, people are haunted by the specter of "trophy homes" or "McMansions" springing up to disrupt established neighborhoods after older and smaller, but sound and often affordable houses are torn down. In such neighborhoods, the vision of affordable housing appearing unexpectedly may be no less troubling, but there is no legitimate reason to view it as more frightening. In Tewksbury, the loosening of the demolition bylaw—though it is in conflict with at least some statements in the master plan—seems to reflect a public policy in support of demolition. If demolition of a house to build a new market-rate house is acceptable, then replacement of a house with eight units of new affordable housing should be acceptable as well.

## IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Tewksbury Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed as shown on drawings by Cuoco & Cormier Engineering Associates, Inc. (Affordable Housing Site Plan), 7/2/02, rev. 6/10/03 (Exh. 19) and architectural drawings entitled Southwood Condominiums (Exh. 5).

(b) Tennessee Road and Mississippi Road shall be constructed or reconstructed to a total width of 24 feet (traveled way 22 feet) as shown on page 51 of the Tewksbury Subdivision Rules and Regulations (Exh. 14).

(c) Each building shall be no greater than 30 feet in height as measured from average grade at the front of the building to the peak of the roof.

(d) Prior to construction, the developer shall comply with all Tewksbury Historic Commission requirements.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: February 1, 2005

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

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